UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. I. DUPONT DE NEMOURS AND COMPANY	)	
AND	)	Case No. 3-CA-27828
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION	)	

BRIEF IN SUPPORT OF EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE JEFFREY D. WEDEKIND

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INTRODUCTION

The sole issue in this case is whether DuPont violated Section 8(a)(5) of the Act by modifying its corporate-wide, BeneFlex Medical Plan without first bargaining with the United Steelworkers Union ("USW" or "Union"). That issue is primarily dependent upon whether the parties' collective bargaining agreement, which permits the Company to make unilateral changes to BeneFlex, expired on April 30, 2010. The evidence shows, contrary to Administrative Law Judge Jeffrey Wedekind's findings, that there is no violation of Section 8(a)(5) because the parties' contract remained in full force and effect at the time of the BeneFlex changes at issue.

In September 2009, the Union gave the Company written notice to terminate the parties' 1983 collective bargaining agreement ("1983 CBA") effective December 9, 2009. In November 2009, prior to the contract termination date, the parties entered into a Memorandum of Agreement ("2009 Contract Extension MOA"), extending the 1983 CBA to April 30, 2010, and beyond absent a written notice to terminate it. The 2009 Contract Extension MOA specifically stated that it would "continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing." The Union never provided the required 60-days written notice, nor ever mentioned anything about contract expiration at any time prior to September 2010.

In September 2010, following its customary practice, the Company announced unilateral changes to its corporate-wide BeneFlex Flexible Benefits Plan ("BeneFlex"), including its BeneFlex Medical Plan. In the past, the Union had challenged the Company's right to make changes to BeneFlex during the term of the 1983 CBA. The Union's ability to contest BeneFlex changes while the 1983 CBA remained in force was foreclosed in August 2010, however, when the Board issued its long-awaited *DuPont* decisions. The *DuPont* decisions made it clear that the Company had a right to make unilateral changes to BeneFlex during the term of a contract, but a

2-1 majority of the Board held DuPont did not retain that right following contract expiration. Realizing that it could no longer challenge the Company's right to make BeneFlex changes while the 1983 CBA was in effect, the Union filed its October 2010 charge, claiming for the first time that the 1983 CBA had expired.

Although the alleged contract expiration formed basis for its charge, the Union could not weave together a consistent story concerning the contract's purported expiration. International Union's representative and chief negotiator – Jim Briggs – executed a sworn affidavit in November 2010, stating that the 1983 CBA had expired on December 9, 2009. Mr. Briggs forgot about the 2009 Contract Extension MOA, which "extended the terms of the [1983] Agreement through April 30, 2010" and continued "in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing." Following the submission of the Briggs affidavit, and following the Company's submission of a position statement to the Region, the Union constructed a new interpretation of the 2009 Contract Extension MOA, arguing that the extension – and, therefore, the 1983 CBA – expired automatically on April 30, 2010. Acknowledging, as he must, that the 2009 Contract Extension MOA includes a 60-day notice provision, Mr. Briggs claimed that the notice provision applied to only one aspect of the 2009 Contract Extension MOA – its no-strike, no-lockout provision. While ALJ Wedekind rejected that interpretation of the 2009 Contract Extension MOA – noting that the 60-day notice provision could not be read to apply only to the no-strike, no-lockout provision – he nonetheless concluded that the parties intended for the 1983 CBA to expire on April 30, 2010. ALJ Wedekind's conclusion is erroneous.

The unambiguous language of the 2009 Contract Extension MOA, the absence of any discussion of the 1983 CBA expiring or terminating automatically on April 30, 2010, and the

parties' entire course of dealing since April 30, 2010 confirm the key fact on which this case should be decided: that the 1983 CBA remained in full force and effect through the January 1, 2011 implementation of the BeneFlex changes at issue. Accordingly, DuPont's unilateral changes to the BeneFlex Medical Plan in 2011 were lawful. Moreover, the Company did not violate Section 8(a)(5) or (1) by making the BeneFlex changes at issue, even assuming that the 2009 Contract Extension MOA did expire (which it did not), because those changes were a simply a continuation of the *status quo* and because the Union had previously agreed to participate in BeneFlex subject to the terms of the BeneFlex plans, including the "reservation of rights" provisions.

PROCEDURAL HISTORY

The Union filed its charge on October 18, 2010, and the Acting General Counsel filed his Complaint on March 31, 2011, alleging that DuPont violated Sections 8(a)(1) and (5) of the Act by announcing changes to its BeneFlex Medical Plan. (ALJD 1).[1] DuPont filed a timely answer denying any wrongdoing.

A hearing was conducted on October 17-18, 2011, before ALJ Wedekind. (ALJD 2). Testimony was presented by four DuPont witnesses, and two Union witnesses. DuPont and Counsel for the Acting General Counsel filed post-hearing briefs, and the record closed with the filing of the briefs. On January 24, 2012, ALJ Wedekind issued his decision, concluding that DuPont had violated Sections 8(a)(5) and (1) by unilaterally implementing changes to the

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[1] References to ALJ Wedekind's decision will be designated as "ALJD," followed by the page and line number(s) cited. Joint Exhibits will be referred to as ("Jt. Exh."). Respondent Exhibits will be referred to as ("Resp. Exh."), and Counsel for the General Counsel's exhibits will be referred to as ("GC Exh."). References to the hearing transcript will be denoted as "Tr.," and references to specific witness testimony will be denoted by the last name of the witness and page number of the transcript where the testimony appears (e.g., "Briggs, 31").

Company's corporate-wide BeneFlex Medical Plan on January 1, 2011, without first bargaining with the Union over those changes. (ALJD 18:16-18).

SUMMARY OF FACTS
(Exception Nos. 1-39)

A. The Parties' Bargaining Relationship

Hourly employees at DuPont's chemical plant in Niagara, New York (the "Niagara Plant") have been represented by the USW or its predecessor unions for decades. DuPont has maintained a single collective bargaining agreement with the USW (and its predecessor Unions) at the Niagara site since March 1983 ("1983 CBA"). (ALJD 2:15-20). The 1983 CBA was an "evergreen" contract that continued year after year unless terminated by either party upon 90 days written notice. (ALJD 2:17-20). On September 4, 2009, the Union served the Company with written notice to terminate the contract effective December 9, 2009. (ALJD 3:23-24).

In September 2009, following the Union's notice, the Company announced changes to its BeneFlex Medical Plan,[2] which would be effective on January 1, 2010. The Company had an established practice of announcing changes to its BeneFlex plans in September or October of each year, without first bargaining with the Union, and with the announced changes becoming effective on January 1st of the following year. (ALJD 3:17-21).

The parties' met to discuss negotiations for a new contract on October 13, 2009. (ALJD 3:33-34). International Union representative Jim Briggs served as the lead negotiator for the

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[2] BeneFlex Flexible Benefits Plan ("BeneFlex") is a cafeteria-style employee benefits plan, which includes several subordinate plans through which DuPont provides health care benefits, dental insurance, vision care, employee and dependent life insurance, and additional vacation that employees can purchase. (Briggs, 33). "The BeneFlex plan, including its waiver provisions permitting the Company to make changes to employee benefits without bargaining, was incorporated into the [1983 CBA] effective January 1, 1996, pursuant to a May 1995 supplemental agreement." (ALJD 3:14-17).

Union, and Marty Idzik served as the lead negotiator for the Company. (Briggs, 36; Idzik, 173). Carol Sarazin, then the Human Resources Manager for the Niagara Plant, also attended bargaining sessions on the Company's behalf, serving as the site representative. (ALJD 5, n. 11).

During the October 13, 2010 meeting, the Union objected to the Company's announcement of the BeneFlex Medical Plan changes, claiming the Company did not have the right to make the changes unilaterally because the Union had "opened" the 1983 CBA by serving its termination notice on September 4, 2009. (ALJD 3:35-37).[3] The Union did not claim that the 1983 CBA would "open" in the future. Rather, it claimed that the Company's announcement of the changes was unlawful because the Union had already "opened the contract" by virtue of the September 2009 termination notice. (Jt. Exh. 5, Tab 1, at 1-2) (Union claiming, on October 13, 2009, that the Company could not make the announced changes because the Union "had served notice that the contract was open."). Mr. Briggs admitted as much during the hearing:

> Q. . . . The Union stated they had served notice that the contract was open.
>
> A. Yeah, the Union served notice, yes.
>
> Q. Okay. And you believed at the time on October 13, 2009 that healthcare and vacation were mandatory subjects of bargaining, correct?
>
> A. Yes, I did.
>
> Q. Okay. And so you were objecting at that point that the communication about the upcoming benefit plan changes was impermissible in your view, at that time?

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[3] Throughout the negotiation, the Union, and indeed both parties, used the term "open contract" to refer to the fact that the Union had given notice to terminate the contract, thereby "opening it" for renegotiation. (Idzik, 175-176, 226-227, 230, 241, 249; Sarazin, 270).

A. At that time.

Q. Okay. And it was your position, because the contract was open for bargaining and you were talking about mandatory subjects . . . the Company shouldn't be announcing changes to them, right.

A. Yes.

(Briggs, 79-80) (emphasis added).

The Company informed the Union that it disagreed with its position. (ALJD 4:5-9).

B. Negotiations to Extend the 1983 CBA

The parties' first official contract bargaining meeting was held on November 4, 2009. (ALJD 4:30-35). During that meeting, the Union made a verbal proposal to extend the existing contract for six months, with a 30-day written notice to terminate. (Idzik, 177). The parties met again on November 13, 16 and 17, 2009, and continued to discuss an extension of the 1983 CBA as its December 9 expiration date drew nearer. (ALJD 5:5-27). During the November 13, 2009, bargaining session, the Company rejected the Union's contract extension proposal, noting that 30 days notice was insufficient. (Sarazin, 263). Mr. Idzik explained that the Company needed at least 60 days notice "to make sure the plant continues to run in the event you [the Union] strike." (ALJD 5:12-22; *see also* Jt. Exh. 5, Tab 3, at 9). If the Union struck and the Niagara Plant had to be shut down, it likely would not resume production. (ALJD 4:21-23). To prevent that from happening, the Company arranged to train a contingency workforce comprised of exempt employees from the Niagara Plant and elsewhere within DuPont, so the Company would be prepared to operate in the event of a work stoppage. (ALJD 4:28-29). The Union was upset by the training of a contingency workforce and demanded that the Company discontinue that training immediately as part of any agreement to extend the contract. (ALJD 4:29-35). As Union bargaining committee member Jim Bright stated during the November 13th meeting:

> We told you the original proposal was for 6 months with a 30-day notice that we would not strike, that we would work off the contract and that we want the training to stop, none of you seem to remember what we read.
>
> * * *
>
> There is some confusion that the company doesn't understand . . . us on the extension. If Carole [Sarazin] comes back and says the training will cease, Jim [Briggs] is prepared to sign it today.

(Jt. Exh. 5, Tab 3 at 10, 12) (emphasis added). This passage indicates that the Union fully understood, in November 2009, that the extension of the contract, contingency training, and no-strike/no-lockout prohibition were all linked together.

During the next bargaining session on November 16, 2009, Mr. Idzik told the Union that the Company was unwilling to discontinue the training because the Company had already gone to great expense to schedule it. (Jt. Exh. 5, Tab 4, at 1). Mr. Briggs asked "why do you need 60 days at the end" of the contract extension, if we announce a strike or you impose a lockout? (ALJD 5:33-35). Carol Sarazin responded that the Company "believed a 60-day opener was valid because the trainers might need refresher training." (ALJD 5:35-37; *see also* Sarazin, 269-270). As this exchange demonstrates, the parties were discussing a "60-day opener" of the contract extension agreement (including its no-strike, no-lockout and training provisions) "at the end" of the agreed-upon period (i.e., after April 30, 2010).[4] Despite ALJ Wedekind's findings to the contrary, Ms. Sarazin's use of the term "opener" – as reflected in the contemporaneous bargaining notes – was deliberate, and was consistent with the notion that the contract extension

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[4] By November 16, 2009, the Union had already "opened" the 1983 CBA for bargaining, by virtue of the September 2009 termination notice. Ms. Sarazin reference to the "60 day opener" related to the termination of contract extension agreement the parties were discussing at the time (i.e., either party could terminate that agreement upon 60 days notice.).

would remain in effect after April 30, but could be terminated with 60-days written notice. (Sarazin, 269-270; ALJD 16:33-34).

The contract extension was discussed again at the next bargaining session held on November 17, 2009. (ALJD 6:18-22). During that bargaining session, Mr. Idzik informed the Union that he was not optimistic that an agreement could be reached prior to December 9, 2009. (ALJD 6:14-16; Idzik, 186-187). On November 20, 2001, 2009, with the contract's expiration date looming, the parties reached agreement on a contract extension (the 2009 Contract Extension MOA) as a result of discussions away from the bargaining table. (ALJD 6:24-25; Jt. Exh. 3). The 2009 Contract Extension MOA states in pertinent part:

> 1. It is in the best interests of the Niagara Plant and Union to have sufficient time to negotiate a new Collective Bargaining Agreement and both parties agree that more time is needed beyond the contract termination date of December 9, 2009.
>
> 2. The parties therefore agree to extend the terms of the Agreement through April 30, 2010. This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance notice in writing except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010.
>
> This means, for example, that if either party wanted to take action May 15, 2010, written notice would have to be provided to Management or the Union no later than March 15, 2010.
>
> 3. As part of this agreement, Management will stop training of exempt employees on hourly jobs once the current 11/16/09 training group has completed their training and will not continue training beyond that point. Training may commence upon notice of termination of the contract extension.

(ALJD 6:29-48; 7:5-6).

As Ms. Sarazin testified, the 2009 Contract Extension MOA was intended to both (1) prohibit a strike or lockout and (2) extend the terms of the 1983 CBA through April 30, 2010

and thereafter until either party gave the required 60 days written termination notice. (Sarazin, 272, 308-309).

Throughout the negotiations, the parties discussed a 60-day "notice of termination of the contract extension" and notice to strike or lockout as being one and the same. (Idzik, 185-186; Sarazin, 292-293, 295-296). While the strike/lockout issue was certainly the focus of the parties' attention – given the potentially catastrophic consequences of a plant shutdown and the Union's opposition to the Company's contingency training – the focus on the strike/lockout issues does not mean the parties intended for the 1983 CBA to expire without notice. Indeed, there is no evidence that the parties ever contemplated that the required 60-day notice to terminate the MOA and extension of the 1983 CBA was something different than the 60-days written notice required before either party could engage in a strike or lockout. And the Union never asserted that the 1983 CBA would expire automatically on April 30, 2010, either before or after the execution of the 2009 Contract Extension MOA. (Sarazin, 273-275).

By agreeing to the 2009 Contract Extension MOA, the Company ensured that it could not be subject to a strike until at least May 1, 2010, slightly more than 5 months after the prior December 2009 contract expiration date. (Jt. Exh. 3). But, if the Union gave the required 60-days notice to terminate the extension before February 28, 2010 (60 days before April 30), it could have struck at any time on or after May 1, 2010. (Idzik, 192).

C. Negotiation of the February 2010 Interim LSE Agreement

In mid-February 2010, the Company proposed an interim agreement to the Union to allow the Company to use Limited Service Employees ("LSEs") during the approaching "summer standards period," which runs from mid-May through mid-September 2010. (ALJD 7:12-13; Sarazin, 278-279; Wallden, 323-324). As part of the negotiations, the Union demanded,

and the Company agreed, that the Company would not use LSEs as part of a contingency workforce in the event of a strike or lockout.

Because the Union could have given 60 days notice under the 2009 Contract Extension MOA and struck as soon as May 1, 2010, the Company proposed extending the no-strike/no-lockout prohibition in the 2009 Contract Extension MOA through September 13, 2010 – the end of the summer standards period. The Company did this to ensure that it could recruit, train and use the LSEs throughout the 2010 summer standards period. (Briggs, 49-50, 104-108; Sarazin, 280). If the no-strike/no-lockout date in the 2009 Contract Extension MOA had not been extended, the Company could have spent substantial resources recruiting and training LSEs pursuant to the interim LSE agreement, only to find itself in a position where it could not use the LSEs because the Union called a strike, as the Company had agreed not to use LSEs during a strike. (Wallden, 325-326; Idzik, 193-194; Briggs, 104-108). The parties executed an "interim LSE agreement" on February 23, 2010, which guaranteed that the no-strike/no-lockout prohibition of the 2009 Contract Extension MOA would be extended through September 13, 2010, thereby guaranteeing that the Company could use LSEs throughout the summer of 2010. (Jt. Exh. 4; Wallden, 326-327).

The interim LSE agreement did not terminate the 2009 Contract Extension MOA; nor did it affect or otherwise modify the notice requirement contained in that Agreement. (Idzik, 194-195; Sarazin, 281). The parties never discussed the 1983 CBA, or its potential expiration, during the negotiation of the interim LSE agreement, in April or May 2010, or at any time thereafter, because there was no need to do so. (ALJD 7:21-23; *see also* Idzik, 217; Jt. Exh. 5, Tabs 26-35). The 2009 Contract Extension MOA extending the 1983 CBA through April 30, 2010 and beyond had not been terminated and remained in force. (ALJD 7:21-23).

Both parties continued to act in a manner that was fully consistent with continued application of the 1983 CBA. (Idzik, 191-192). For example, the Company continued to collect Union dues pursuant to the dues check-off provision in the 1983 CBA, instead of discontinuing the dues deductions as it had at other USW-represented locations where the labor contracts had expired. (Briggs, 133-134, 151).

D. Negotiation of the July 2010 No-Strike/No-Lockout Agreement

Pursuant to the interim LSE agreement, the Union could have called a strike starting on September 14, 2010. As that strike date approached, the Company once again became concerned about a possible strike, and the potential need for contingency training. (Wallden, 328-329). As a result, during a bargaining session held on June 30, 2010, the Company proposed a new agreement to extend the no-strike/no-lockout date in the interim LSE agreement by six months, from September 13, 2010 until March 31, 2011. (ALJD 7:26-28). The Union rejected the Company's proposal, offering instead to extend the no-strike/no-lockout date by one month, to October 13, 2010, but only if the Company agreed to an immediate 1.5% wage increase, among other things. (ALJD 7:28-29; *see also* Jt. Exh. 5, Tab 39, at 1). In response, the Company agreed to the Union's proposed no-strike/no-lockout date, but proposed that the no strike prohibition would continue until cancelled by mutual agreement or by either party giving at least 60 days written notice to the other party after October 13, 2010. (ALJD 7:30-31).

Mr. Briggs contacted Mr. Idzik by telephone on July 21, 2010, because he was upset that Plant Manager Wallden had spoken to Local Union President Freeburg about the proposal for a new no-strike/no-lockout agreement away from the bargaining table. (Idzik, 203-204, 221; Briggs, 53). According to Mr. Briggs, Mr. Wallden had given Mr. Freeburg a deadline of the next day to get back to the Company as to whether the Union would agree to the proposed extension of the September 13, 2010 strike date. (Idzik, 205-206).

Mr. Idzik called Mr. Briggs back later in the day on July 21, 2010, after having spoken to Mr. Wallden. (Idzik, 206-207). During that second telephone conversation, Mr. Briggs mentioned that the contract was "open," [and] the annual BeneFlex changes would be announced again in October providing the Union leverage; he also mentioned the possibility of a "global settlement." (Idzik, 207-208). Mr. Briggs did not say the 1983 CBA had terminated or expired; he merely said the contract was "open," just as he had on October 13, 2009, when discussing the announcement of the prior year's BeneFlex changes, a time when the 1983 CBA had clearly not expired. (ALJD 8:40-41, 44-46; Idzik, 208).

Mr. Briggs never claimed or otherwise suggested that the 1983 CBA had terminated or expired at any time prior to the Union filing its unfair labor practice charge. (ALJD 8:18-20, 35-40; *see also* Idzik, 208-209, 217). As a labor lawyer with over 30 years of experience, Mr. Idzik would have understood immediately the ramifications of any such claim, and he would have consulted with the Company to determine what legal options were available to it if the Union had made any such claim. (Idzik, 208-209, 217). Mr. Idzik never had such conversations because the Union never stated to him, at any time, that it believed the 1983 CBA had expired.[5] (*Id.* 209, 217).

The parties ultimately agreed to an "Interim Agreement -- No Strike/No Lockout" on July 26, 2010 ("July 2010 Interim Agreement"). (Jt. Exh. 6). That agreement extended the no-

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[5] Mr. Briggs testified that he told Mr. Idzik that he wanted to be crystal clear that he didn't want to be getting into a new contract extension during the July 21, 2010 call. (Briggs, 54). Mr. Idzik categorically denied that Mr. Briggs ever said anything about a contract extension during this phone call. (Idzik, 208-209). ALJ Wedekind correctly rejected Mr. Briggs' account of the conversation, and credited Mr. Idzik's contemporaneous notes of the telephone conversation. (ALJD 8:39-40; DuPont Exh. 6).

strike/no-lockout date through October 13, 2011, and 60 days thereafter until either party gave notice to terminate the agreement. (*Id.*).

The July 2010 Interim Agreement also contained a provision stating that no other promises or representations were intended or made by either party with regard to any subjects other than strike or lockout. (*Id.*). Mr. Idzik wrote that language after the Union said it wanted to make sure that by signing the July 2010 Interim, it was not prejudicing or waiving any rights they would have with regard to other matters. (ALJD 8:15-21).[6] The Company did not object because, on its face, there was nothing in the proposed language of the July 2010 Interim Agreement that could reasonably be construed as a waiver of either party's rights with respect to other matters. (Idzik, 217). Thus, the July 2010 Interim Agreement did not terminate or otherwise amend the 60-day notice requirement of the 2009 Contract Extension MOA.

E. The Board's BeneFlex Decisions Are Inconsistent With the Union's Initial Position

On August 26, 2010, the Board issued two decisions regarding DuPont's right to make unilateral changes to its BeneFlex Medical Plan. *See E.I. DuPont de Nemours (Louisville Works)*, 355 NLRB Slip Op. 176 (August 2010) and *E.I. DuPont de Nemours & Co.*, 355 NLRB Slip Op. 177 (August 2010). In those cases, the Board found that the Company violated Section 8(a)(5) by making changes to BeneFlex after contract expiration, during a contract hiatus period. In so ruling, the Board made it clear that DuPont is entitled to implement – unilaterally – changes

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[6] Mr. Freeburg informed Mr. Wallden that the Union, by agreeing to the proposed July Interim did not want to affect the Union's rights or ability to do anything else with respect to other matters. (Wallden, 339). Similar to Mr. Briggs, Mr. Freeburg never mentioned anything about the 1983 CBA having expired or anything having to do with a contract extension in that discussion. (Wallden, 339-340).

to BeneFlex while a contract, such as the 1983 CBA containing the IRP&P provision remains in force.

The Board's *DuPont* decisions were clearly inconsistent with the position the Union had taken in the past with respect to the Company's right to change BeneFlex unilaterally. For example, in August 2006, DuPont announced changes to two BeneFlex plans, the BeneFlex Employee Life Insurance Plan and the BeneFlex Vacation Buying Plan, along with the Company's Pension and Retirement Plan, the Savings and Investment Plan, and Vacation Plan. (Briggs, 126; DuPont Exh. 5). The Union filed an unfair labor practice change challenging the Company's right to make the 2006 benefit plan changes, even though the 1983 CBA was clearly in effect when the changes were announced and implemented. (DuPont Exh. 4).

Similarly, at the beginning of bargaining in October 2009, the Union took the position that the Company's announcement of BeneFlex changes was unlawful because the Union had given notice "opening" the contract for bargaining. (Jt. Exh. 5, Tab 1, at 1). The position the Union advanced in 2006 and 2009 was inconsistent with the Board decisions in the *DuPont* cases, as the 1983 CBA was in effect when the Union challenged the BeneFlex changes as being unlawful in both 2006 and 2009.

F. The 2011 BeneFlex Changes and Union Unfair Labor Practice Charge

On September 13, 2010, the Company met with the Union and announced changes to BeneFlex for the upcoming plan year, as it had done for more than a decade. (ALJD 10:7-8; Sarazin, 263, 291). The Union objected to the Company's announcement of the BeneFlex changes, just as it had the prior year while the 1983 CBA was clearly in effect. (ALJD 10:10-12). The Union did not state in the September 13, 2010 meeting that the parties' contract had expired. It simply referenced the Board's *DuPont* decisions, and claimed that the announcement of the changes was illegal. (ALJD 10:10-14; Briggs, 56). The Company's new

Human Resources Manager, Kenneth Williams, had not read the *DuPont* decisions, but was aware that DuPont disagreed with them. (Williams, 345, 349). In response to the Union's objection, Mr. Williams told the Union that the Company disagreed with the Board's decisions, and it was simply following the *status quo* and doing what it had always done in the past with respect to announcing changes to BeneFlex. (ALJD 10:16-18; *see also* Briggs, 56-58).

The parties held a bargaining session on September 27, 2010, four days later. (ALJD 10:20-24). At that meeting, the Union again objected to the Company's announcement of changes to BeneFlex, and Mr. Williams reiterated what he had said in the prior meeting. (ALJD 10:20-24). At no time during the September 27, 2010 meeting did the Union claim that the 1993 CBA had expired or terminated. (Jt. Exh. 5, Tab 44, at 3; DuPont Exh. 2; *see also* Williams, 345). Mr. Idzik was not present for the September 13 and 27, 2010 meetings when the 2011 BeneFlex changes at issue here were discussed.

The Union filed its unfair labor practice charge in this case on October 18, 2010, prior to the implementation of the 2011 BeneFlex changes, claiming the Company's announcement of the changes was unlawful. (GC Exh. 1(a)). On November 18, 2010, Union lead negotiator Jim Briggs met with Board agents in the Niagara Field Office and provided a sworn affidavit in support of the Union's charge. (Briggs, 61). In his affidavit Mr. Briggs stated, under oath:

> Since 1983 there has been a contract in effect between the parties. I'm told this contract expired on or about 12/9/09. . . . Before it expired 12/9/09, the Employer has the right to make certain unilateral changes to Beneflex . . . (Briggs, at 61-62) (emphasis added).

Thus, in November 2010, Mr. Briggs believed, mistakenly, that the 1983 CBA had expired in December 2009 as a result of the 90-day notice provided by the Union in September 2009. He completely ignored the fact that the parties had entered into the 2009 Contract Extension MOA,

extending the contract beyond December 9, 2009 – a contract extension that continued until either party provided 60-days notice of termination. (*Id*). While acknowledging the importance of the contract's alleged expiration, Mr. Briggs testified at the hearing that he must have missed both references to the December 9, 2009, expiration date when he reviewed his declaration, and he even suggested – incredibly – that the Board agent may have mistyped the information he provided. (*Id.* at 64).

ARGUMENT

I. THE ALJ ERRED BY FAILING TO FIND THAT DUPONT HAD A CONTINUING CONTRACTUAL RIGHT, BASED ON THE CONTRACT EXTENSION, TO MODIFY ITS BENEFLEX PLAN (Exception Nos. 32-33, 37-39)

Judge Wedekind concluded that the 2009 Contract Extension MOA was ambiguous and, then, relying on extrinsic evidence, concluded that the 1983 CBA expired automatically on April 30, 2010, depriving the Company of its contractual right to make the 2011 BeneFlex changes at issue here. (ALJD 13:36-38; 17:26:28). As demonstrated more fully below, the ALJ's conclusions are factually and legally erroneous for several reasons.

First, application of fundamental principles of contract construction compel the conclusion that the 2009 Contract Extension MOA clearly and unambiguously extended the 1983 CBA to April 30, 2010, and beyond, until 60-days written notice of termination was provided. Second, the ALJ failed to consider significant extrinsic evidence that sheds light on parties' actions both before and after they entered into the 2009 Contract Extension MOA, all of which were consistent with the 2009 Contract Extension MOA remaining in effect beyond April 30,2010. Third, a review of all of the relevant extrinsic evidence confirms that the parties did not intend for 2009 Contract Extension MOA to expire automatically on April 30, 2010. Fourth, the extrinsic evidence relied on by the Judge in finding that the 1983 CBA expired on April 30, 2010 does not withstand scrutiny.

A. The 2009 Contract Extension MOA Unambiguously Extended the 1983 CBA to April 30, 2010 and Beyond In the Absence of 60 Days Written Notice (Exception Nos. 12-17)

ALJ Wedekind erred by concluding that the 2009 Contract Extension MOA is ambiguous. (ALJD 13:36-38). Fundamental rules of contract interpretation compel the conclusion that the 1983 CBA did not expire automatically on April 30, 2010, but continued forward absent 60 days written notice.

The 2009 Contract Extension MOA contains several separate provisions, all of which must be read in conjunction with one another. *See Statesman II Apartments, Inc. v. U.S.*, 66 Fed. Cl. 608, 616 (Fed.Cl. 2005) (an "instrument must be read as a whole and interpreted so as to harmonize and give a reasonable meaning to all of its parts") (quoting *NVT Tech., Inc. v. U.S.*, 370 F.3d 1153, 1159 (Fed. Cir. 2004)).

As Judge Wedekind correctly stated, the first two sentences of the 2009 Contract Extension MOA clearly reflect the parties' belief that it was in both of their interests to extend the 1983 CBA to allow them time to negotiate a successor contract:

> 1. It is in the best interests of the Niagara Plant and Union to have sufficient time to negotiate a new Collective Bargaining Agreement and both parties agree that more time is needed beyond the contract termination date of December 9, 2009.
>
> 2. The parties therefore agree to extend the terms of the Agreement through April 30, 2010.

(ALJD 11:25-31; Jt. Exh. 3). The Judge's ultimate conclusion – that the 1983 CBA expired on April 30th – might be reasonable if the 2009 Contract Extension MOA ended after the first sentence of Section 2. *But it does not*. Section 2, extending the 1983 CBA, contains the additional key notice provision, which states:

> This agreement shall continue in full force and effect until terminated by either party with sixty (60) calendar days advance

> notice in writing except in no case will the COMPANY or the UNION strike or lockout prior to April 30, 2010.

Given that the 2009 Contract Extension MOA must be interpreted as a whole, the underscored language must be read to extend the terms of the entire MOA, including the provision extending the 1983 CBA, until the required 60 days written notice to terminate was given. This interpretation is fully consistent with the parties' intent as of November 2009 because: (1) it continued the terms of the parties' existing contract (and prevented any work stoppage) on an ongoing basis to allow the parties to focus their attention on reaching a successor agreement; and (2) it provided the Company with the 60-day notice period it believed necessary to prepare for a potential strike if and when the Union terminated the 2009 Contract Extension MOA.

Moreover, ALJ Wedekind specifically rejected the Union's argument that the 60-day written notice provision in the 2009 Contract Extension MOA applies solely to the parties' no strike/no lockout commitment, finding that the 60 notice requirement applied to the entire 2009 Contract Extension MOA. (ALJD 12:22-25). That finding is fully supported by Section 3 of the 2009 Contract Extension MOA, which expressly permits the Company to begin contingency training (in anticipation of a possible strike) only "upon notice of termination of the contract extension." There is only one "notice" referenced in the 2009 Contract Extension MOA – the "60 day written notice." And at the time the 2009 Contract Extension MOA was negotiated, there was only one "contract" that could be extended – the 1983 CBA. Accordingly, the only logical reading of the 2009 Contract Extension MOA is that the 60 day written notice provision

related not only to the no-strike, no-lockout commitment, but also to the "agreement" to extend the 1983 CBA through at least April 30, 2010, and beyond if no notice were given. [7]

In addition, the Judge found that the term "this agreement" in the second sentence of the 2009 Contract Extension MOA referred to the entire MOA. Consistent with that finding, the entire 2009 Contract Extension MOA continued forward, beyond, April 30, 2010, because the Union did not provide the required 60 days notice of termination. (ALJD 12:23-27). It logically follows, then that if the entire 2009 Contract Extension MOA continued beyond April 30, 2010, absent notice, then the extension of the 1983 CBA contained in that agreement, must continue forward as well, absent some clear evidence to the contrary. No such evidence exists.

ALJ Wedekind found that the listed "'except[ion]' at the end of the [second] sentence, providing that 'in no case' will either party strike or lockout prior to April 30, 2010, suggests that the provision was intended to address whether and how the contract extension could be terminated prior to April 30, 2010 rather than after." (ALJD 12:30-33). That finding, which forms a substantial basis for the Judge's ultimate conclusion, is inconsistent with the record evidence.

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[7] If the 1983 CBA expired automatically on April 30, as the ALJ ultimately found, there would be no need for the parties to have included the language in Section 3 providing for "notice of termination of the contract extension" The ALJ's interpretation of the 2009 Contract Extension MOA must be rejected because it renders the MOA internally inconsistent and nonsensical and because an alternative construction – that advanced by the Company – removes any internal inconsistency. *See, e.g., Quality Oil, Inc. v. Kelley Partners, Inc.*, 657 F.3d 609, 614 (7th Cir. 2011) (interpreting contract as a whole and avoiding "absurd" interpretation based on one provision read in isolation); *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284 (7th Cir. 2002) ("Nonsensical interpretations of contracts, as of statutes, are disfavored"); *Williamson v. J.C. Penney Life Ins. Co.*, 226 F.3d 408, 409 (5th Cir. 2000) ("The ordinary meaning of the text governs in the absence of an absurd result, and each provision is read in light of the others.").

There is simply no evidence to suggest that the parties ever considered "whether or how the contract extension could be terminated prior to April 30, 2010," as the Judge suggests. Indeed, both parties agreed that the 1983 CBA continued in force through at least April 30, 2010; the only dispute is whether the contract was extended beyond April 30. Indeed, as noted above, the Judge specifically found that the first two sentences of the 2009 Contract Extension MOA "clearly and unambiguously extended the parties' contract through April 30, 2010." (ALJD 11:33-35). In light of that finding, the Judge clearly erred in finding that any part of the 2009 Contract Extension MOA contemplated termination of the "contract extension" prior to April 30, 2010.

In sum, the unambiguous language of the 2009 Contract Extension MOA establishes that the entirety of the commitments set forth in that Agreement – including the extension of the 1983 CBA, and the parties' no-strike/no-lockout pledge – continued through and beyond April 30, 2010, pending 60-days advance written notice of termination. Because the Union failed to provide the required written notice, the 1983 CBA remained in effect at the time the Company announced and implemented the 2011 BeneFlex changes at issue here. As a result, and consistent with the rulings in the *DuPont* cases, the ALJ's decision should be reversed, and the Complaint should be dismissed.

B. The Judge Erred In His Analysis of the Extrinsic Evidence, Which Demonstrates That the 1983 CBA Did Not Expire Automatically

1. The Judge Failed to Consider Significant Probative Evidence (Exception Nos. 18, 26, 31)

In his opinion, ALJ Wedekind states that the 1983 CBA "admittedly waived the Union's right to bargain" over changes to BeneFlex. (ALJD 1). Until recently, however, the Union did not admit that the Company had the unilateral right to make changes to BeneFlex.

The Industrial Relations Plans and Practices ("IRP&P") provision of the 1983 CBA grants DuPont the right to make changes, unilaterally, to the Company-wide benefits plans identified in that provision, including BeneFlex. (ALJD 3:14-17). The IRP&P provision in the 1983 CBA was modified to include a specific section relating to BeneFlex, which provides in pertinent part:

> Changes to the BeneFlex Flexible Benefits plan, including changes that have the effect of reducing or terminating benefits, may be made to the BeneFlex Flexible Benefits Plan in accordance with the terms and conditions of said Plan.

(Jt. Exh. 1, at 46-47). In addition, the BeneFlex plan contains a specific reservation of rights provision that grants the Company the right to modify or terminate the plan at its discretion. (Sarazin, 290-291).

Despite the clarity of the IRP&P provision and BeneFlex plan's reservation of rights provision, the Union has in the past claimed that DuPont did not have the right to make BeneFlex changes unilaterally. For example, the Company introduced evidence at the hearing showing that on December 26, 2006, while the 1983 CBA was unquestionably in effect, the Union filed an unfair labor practice charge, claiming that DuPont violated Section 8(a)(5) by modifying unilaterally the BeneFlex Employee Life Insurance Plan, BeneFlex Vacation Buying Plan, as well as the Pension and Retirement Plan, Savings and Investment Plan, and certain other corporate-wide benefit plans identified in the IRP&P provision. (DuPont Exhs. 4-5).[8] Simply

[8] Consistent with its prior position that the Company did not have the right to change BeneFlex unilaterally when a contract is in place, the Union objected to the Company's announcement of BeneFlex changes in October 2009, while the 1983 CBA, including the IRP&P provision, was unquestionably in full force and effect.

stated, prior to this case, the Union did not view the 1983 CBA as posing an impediment to a challenge to the Company's right to make unilateral BeneFlex changes.

The legal landscape changed markedly in late August 2010, however. On August 26, 2010, the Board issued its two *DuPont* decisions which made clear that DuPont had the contractual right to make changes to the BeneFlex Medical Plan unilaterally pursuant to the IRP&P provision during the term of the parties' contract. *E.I. DuPont de Nemours (Louisville Works)*, 355 NLRB Slip Op. 176, at 1 (August 2010). The Board's ruling effectively foreclosed the arguments advanced by the Union in 2006 and 2009, when it challenged the Company's right to modify the IRP&P plans unilaterally during the term of the 1983 CBA. But the Board also held in the *DuPont* cases that DuPont did not have the right to change BeneFlex unilaterally following the expiration of a contract containing the IRP&P provision.

After the *DuPont* decisions were issued, the Union realized that it could no longer challenge the Company's right to make BeneFlex changes during the term of the 1983 CBA. Although the Union had not previously claimed that the 1983 CBA had expired, the Union's interpretation of events changed upon reading the *DuPont* decisions. With the *DuPont* decisions in mind, the Union filed a charge in October 2010, and claimed for the first time that the 1983 CBA had expired.

2. The Judge Failed to Appreciate the Significance of the Material Errors in the Union's Sworn Affidavit to the Board

Although the alleged expiration of the 1983 CBA formed the basis for its charge, the Union could not articulate accurately the facts associated with the contract's purported expiration at the time it filed its charge. Mr. Briggs, the Union's chief negotiator, provided the Region with an affidavit, under oath, in November 2010, in support of the Union's charge, which stated not

once, but twice, that the 1983 CBA had expired on December 9, 2009 – 90 days after the Union's notice to terminate the contract. There is no mention whatsoever of the 2009 Contract Extension MOA anywhere in Mr. Briggs' affidavit." (Jt. Exh. 3). In fact, the evidence shows that it was only after being reminded of the 2009 Contract Extension MOA, which extended the term of the 1983 CBA – and after realizing that the *DuPont* cases were fatal to its charge – that the Union created a newly-minted interpretation of the 2009 Contract Extension MOA, which it advanced at the hearing: that the 1983 CBA expired on April 30th and the 60-day written termination notice pertained solely to the no-strike, no lockout provision, and not to the extension of the 1983 CBA.

Judge Wedekind's decision utterly ignores the seminal fact that prior to the August 2010 *DuPont* decisions, the Union had challenged the Company's right to make BeneFlex changes while the 1983 CBA was clearly in effect. The Judge also glosses over Mr. Briggs' inexplicable failure to provide the Board with an accurate account of the circumstances pertaining to the alleged expiration of the 1983 CBA. These facts, ignored by the Judge, are critical because they shed light on, and effectively refute, the Union's post-hoc explanation of the events that led ALJ Wedekind to credit the Union's revisionist argument that the 1983 CBA expired on April 30, 2010.

C. The Relevant Extrinsic Evidence Demonstrates the Error in the ALJ's Finding that the 2009 Contract Extension MOA Expired Automatically on April 30, 2010 (Exception Nos. 20-21, 29-30)

In addition to ignoring critical, undisputed evidence, Judge Wedekind also erred by failing to properly analyze relevant extrinsic evidence showing that the parties, at the time the 2009 Contract Extension MOA was negotiated, did not intend for the 2009 Contract Extension MOA to expire automatically on April 30, 2010. As noted above, the Union formed that intent well after the 2009 Contract Extension MOA was executed.

The 2009 Contract Extension MOA, like any contract, must be interpreted in a manner that is consistent with the parties' intent. *See Dardovitch v. Haltzman*, 190 F.3d 125, 139 (3d Cir. 1999) (citing *Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1181 (3d Cir. 1979) ("It is beyond cavil that the touchstone of contract interpretation is the intent of the parties."); *Air Line Stewards and Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American Airlines, Inc.*, 763 F.2d 875, 877 (7th Cir. 1985) ("The primary object in construing a contract is to give effect to the intention of the parties."). Contrary to the Judge's findings, the evidence shows that the parties fully intended for the 2009 Contract Extension MOA to extend the 1983 CBA to April 30, 2010, and thereafter, unless and until 60 days written notice to terminate it was given.

First, the Company's witnesses testified without contradiction that the contract extension MOA was intended to both extend the terms of the 1983 CBA and the parties' no-strike/no-lockout commitment through April 30, 2010, and thereafter until either party gave the required 60-days written notice of termination. (Sarazin, 272, 308-309).[9] Indeed, Mr. Idzik testified that the notice provisions the parties discussed in the bargaining leading up to the execution of the contract extension MOA applied "simultaneously" to the contract extension and no strike commitment. (Idzik, 185-186). In short, as of November 2009, there was no reason for the

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[9] As noted previously, Ms. Sarazin suggested "a 60-day opener" by included as part of the 2009 Contract Extension MOA. (Sarazin, 269-270). The dialogue regarding this 60-day opener related to 2009 Contract Extension MOA (including its no-strike, no-lockout and training provisions) "at the end" of the agreed-upon period (i.e., after April 30, 2010). ALJ Wedekind erred in suggesting that Ms. Sarazin misspoke when she used the term "opener." (*see* ALJD 16:33-34). Read in context, Ms. Sarazin use of the term "60 day reopener" was clearly deliberate, and was fully consistent with the notion that the 2009 Contract Extension MOA would remain in effect after April 30, but could be terminated with 60-days written notice. (Sarazin, 269-270).

parties to differentiate between notice of termination of the contract extension and notice of termination of the parties' no-strike/no-lockout commitment.[10]

Second, as the parties' contemporaneous bargaining notes make clear, there was absolutely no discussion during the period from November 20, 2009 through April 30, 2010, or in any of the dozens of bargaining sessions thereafter, of the 1983 CBA expiring or being terminated. The record shows that the parties spent considerable time discussing contract extension issues as the 1983 CBA's December 9, 2009 expiration neared. The lead negotiators for both parties have extensive experience negotiating labor agreements and know full well the ramifications associated with the expiration of a collective bargaining agreement. It strains logic to suggest that the parties discussed extending the 1983 CBA at length in November 2009, prior to the looming expiration date of December 9, 2009, but then said nothing about the expiration of the 2009 Contract Extension MOA in March, April or May 2010, as the alleged expiration date came and went.

Third, the evidence shows that the parties continued to abide by the terms of the 1983 CBA after April 30, 2010. The Company continued union dues deductions consistent with its ongoing contractual obligations, even though it had ceased deducting Union does at other USW-represented facilities after the contracts there expired. (Briggs, 151). Similarly, the Company never informed the Union that it would no longer arbitrate grievances – a point of leverage in contract negotiations that an employer can wield following contract expiration. (Briggs, 112; *see also Nolde Brothers v. Bakery Workers*, 430 U.S. 243 (1977)). In addition, there is no evidence

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[10] As explained below, dates associated with the parties' no-strike/no-lockout commitment and 1983 CBA expiration became de-linked when the parties executed the interim LSE agreement in late February 2010, for reasons having nothing to do with the continued application of the 1983 CBA. *See infra* pp. 30-32.

that the parties ever discussed an "impasse" in negotiations, and there would be no reason to do so, as DuPont could not have implemented its contract offer upon impasse because the terms of the 1983 CBA remained in place by virtue of the 2009 Contract Extension MOA. In short, the Union has not, and cannot, point to any action taken by either party that is inconsistent with the continuation of the 1983 CBA beyond April 30, 2010.

Fourth, the Judge's conclusion that the parties intended to extend the 1983 CBA only to April 30, 2010, is illogical when considered in context. There is no evidence in the parties' extensive bargaining notes or elsewhere to support the notion that either the Company or Union was unwilling to extend the 1983 CBA beyond April 30, 2010. Indeed, having the 1983 CBA expire automatically, without notice, on April 30, 2010 would not have been in the Union's interests at the time the contract extension MOA was negotiated. The Union acknowledges, as it must, that it could not strike under the terms of the 2009 Contract Extension MOA until April 30, 2010, and thereafter, until either party provided 60-days written notice of termination. If, as the Union now contends, the 2009 Contract Extension MOA extended the 1983 CBA only until April 30th, then the Company could have discontinued Union dues deductions and rejected Union demands for post-expiration arbitration of grievances immediately on May 1, 2010, to gain leverage in contract negotiations, without any advance notice to the Union. And in that event, under the Union's construction, the Union could not strike in response without first providing 60-days written notice. It is illogical to assume that the Union would have entered into an agreement yielding such a result.

Both the Union and General counsel argued that the Union intended to extend the 1983 CBA only through April 30th because it wanted the ability to challenge the Company's right to make the next round of BeneFlex changes. (Briggs, 47-48). As ALJ correctly noted, that

argument makes little sense given the time at which, and context in which, the 2009 Contract Extension MOA was negotiated. (ALJD 14, n. 13).

There is no dispute that the Company had a consistent practice of announcing BeneFlex changes in the fall of each year, and implementing those changes on January 1st of the following year. The Unions' claim that was unwilling to extend the 1983 CBA beyond April 30, 2010, so it could challenge BeneFlex changes announced in the fall of 2010, presupposes that in November 2009 the Union believed that contract negotiations would not be completed by at least September or October 2010, after more than 10-11 months of bargaining. While history has shown that the parties were in fact unable to reach agreement by the fall of 2010, there is no evidence that either party anticipated – in November 2009 – that they would not be able to reach agreement by that time.

More importantly, the Union retained the ability to assert – as it does here – that post-expiration BeneFlex changes are unlawful without the 2009 Contract Extension MOA expiring automatically on April 30, 2010. All the Union needed to do was provide the Company with written notice to terminate the 2009 Contract Extension MOA at least 60 days before January 1, 2011, when the next round of BeneFlex changes would be made.

In short, the extrinsic record evidence shows that the parties intended for the 2009 Contract Extension MOA to extend the 1983 CBA to April 30, 2010, and thereafter until the required notice was provided.

D. The Evidence Relied Upon By Judge Wedekind Does Not Support the Conclusion That The Parties Intended for the 1983 CBA to Expire On April 30, 2010 (Exception Nos. 4-9, 16, 19, 22-25)

ALJ Wedekind cites to five bases for his conclusion that extrinsic evidence provides "substantial" support for the Union's claim that the 1983 CBA expired automatically on April 30, 2010:

- that it would not have made sense for the Union to have agreed to an indefinite extension of the 1983 CBA;
- the 60-day notice provision was initially discussed in the context of strikes and lockouts;
- the parties entered into two interim agreements after the contract extension agreement;
- Mr. Briggs effectively expressed the Union's belief that the 1983 CBA expired automatically on April 30, 2010 during his July 21, 2010 telephone conversations with Mr. Idzik; and
- the Company's new Human Resources Manager, Mr. Williams, did not cite to the 1983 CBA or 2009 Contract Extension MOA in September 2010, when the Union objected to the announcement of the 2011 BeneFlex changes.

(ALJD 14:13-16, 22-24, 33-34; 15:27-29, 37-38). As explained below, none of the bases relied upon by the Judge withstands scrutiny.

1. There Is No Evidence that, In November 2010, The Union or The Company Was Opposed To An Extension of the 1983 CBA Beyond April 30, 2010 If A Contract Was Not Reached

The Judge noted that the Union had given notice for the contract to terminate on December 9, 2009, and assumed that there would be no reason to agree to an indefinite extension of the contract thereafter subject to another notice. (ALJD 14:13-17). That rationale is wholly unsupported by the record. The undisputed record shows that the parties entered into the 2009 Contract Extension MOA in November 2009, extending the 1983 CBA for at least 5 additional months to allow the parties time to fully negotiate a successor agreement. As noted above, the Union has not identified, and cannot identify, any logical reason why the parties would not have agreed, in November 2009, to permit the continued extension of the 1983 CBA beyond April 30, 2010.

Moreover, the language of the 2009 Contract Extension MOA shows that the parties' fully recognized that it was "in the best interests of the Niagara Plant and Union to have sufficient time to negotiate a new Collective Bargaining Agreement." There is no reason to

believe that parties' interests in extending the 1983 CBA to allow time to negotiate a successor contract would have been different on April 30, 2010, than they were on November 2009, if the parties had not yet reached a contract. Said differently, if the parties determined that it was in their best interest to have enough time to negotiate a successor agreement before the 1983 CBA expired (as reflected in the 2009 Contract Extension MOA), it is logical to assume that they would want to continue that agreement beyond April 30, 2010 if an agreement had not been reached, rather than have to negotiate a brand new contract extension agreement.

2. The Discussion of 60-day Notice In the Context of Strikes and Lockouts Does Not Indicate That the Parties Intended the 2009 Contract Extension MOA to Expire Automatically Without Written Notice

The Judge notes that the 60-day notice provision in the contract extension agreement was initially discussed in relation to strikes and lockouts, and suggests that this supports a finding that parties intended for the 1983 CBA to expire automatically. (ALJD 14:22-24). It does not.

As an initial matter, the Judge specifically, and correctly, rejected the Union's argument that the 60-day written notice provision in the 2009 Contract Extension MOA applies solely to the parties' no strike/no lockout commitment. (ALJD 12:23-27). More importantly, as noted above, there is no evidence that the parties ever contemplated that the required 60-day notice to terminate the MOA and extension of the 1983 CBA was something different than the 60-days written notice required before either party could engage in a strike or lockout. They were always considered one and the same, at least until the August 2010 *DuPont* decisions were issued, and the Union changed its stance.

3. The Interim LSE Agreement and July 2010 Interim Agreement Did Not Alter The Notice Requirement Applicable to the Termination of the 1983 CBA

The Judge cites the parties' execution of the "interim LSE agreement" and July 2010 Interim Agreement as evidence of the parties' intent for the 1983 CBA to expire on April 30, 2010. (ALJD 14:33-40, 15:5-25). Contrary to the Judge's findings, nothing in the negotiation of either the interim LSE Agreement or the July 2010 Interim Agreement suggests in any way that the parties intended the 1983 CBA to expire on April 30.

a. The Judge Misconstrued the Bargaining History Associated with the Interim LSE Agreement

The Judge found that the interim LSE agreement extended the "entire no strike/lockout agreement" in the 2009 Contract Extension MOA and it would have been "unnecessary to do so if the MOA, including the no-strike or lockout agreement, rolled over and continued in effect absent such notice." (ALJD 15:5-9). The Judge's conclusion belies a fundamental misunderstanding of the interim LSE agreement, and how it related to the 2009 Contract Extension MOA.

The Company made a contract proposal in January 2009 regarding the use of the LSEs, which would have allowed the Company to use LSEs during the summer standards period (mid-May through mid-September). (Sarazin, 278-279; Wallden, 323-324). By February 2010, it became apparent the parties were not likely to reach a complete contract containing the proposed LSE provision in time for the summer standards period, so the Company proposed an interim agreement that would permit the use of LSEs, even if a successor contract was not completed by the summer months. The interim LSE agreement proposed by the Company had nothing to do with strikes, lockouts or the extension of the 1983 CBA.

Recognizing that the Company or Union could give 60 days notice to terminate the 2009 Contract Extension MOA, and institute a lockout or strike during the summer months, the Union refused to agree to the proposed interim LSE agreement unless the Company agreed that it would not use LSEs as part of a contingency workforce. The Company, having had no intention of using LSEs as part of a contingency workface, agreed. (Briggs, 49-50, 104-108; Sarazin, 280). But that created a potential problem because, while the Company could recruit and train LSEs in the spring of 2010, in the anticipation of using them in the summer of 2010, the Union could have scuttled those plans by giving notice to terminate the 2009 Contract Extension MOA and calling a strike during the summer of 2010. If that occurred, the Company, having spent the money to recruit and train the LSEs, would not be permitted to use them, given its agreement not to use LSEs during a strike. (Wallden, 325-326; Idzik, 193-194; Briggs, 104-108). To avoid that potential problem, the Company proposed extending the no-strike/no-lockout date in the 2009 Contract Extension MOA until September 13, 2010 – allowing the Company to recruit, train, and use LSEs during the summer of 2010 without fear of a strike.

Thus, contrary to the Judge's conclusion, it was in fact necessary to extend the strike/lockout date through the end of the summer of 2010 for reasons wholly unrelated to the 2009 Contract Extension MOA itself. And the Company could not have relied on the continuation, or "continued rollover," of the 2009 Contract Extension MOA, as the Judge mistakenly suggests, because the Union retained the ability to terminate that agreement after April 30, 2010, and would, therefore, be able to deprive the Company of an ability to use LSEs during the "summer standards" period. The record is also clear that the interim LSE agreement did not terminate the 2009 Contract Extension MOA; nor did it affect or otherwise modify the notice requirement contained in that Agreement. (Idzik, 194-195; Sarazin, 281).

b. The July 2010 Interim Agreement Had No Bearing On the Extension of the 1983 CBA

The ALJ also concluded that the parties' execution of the July 2010 Interim Agreement is evidence that the parties intended for the 1983 CBA to expire automatically on April 30, 2010. (ALJD 15:10-25). The ALJ both misinterpreted the agreement and failed to understand the motivation behind it.

As an initial matter, there is nothing in the plain language of the July 2010 Interim Agreement that makes any reference to the 2009 Contract Extension MOA or the 1983 CBA. And none was necessary because neither party had terminated the 2009 Contract Extension MOA.

Rather, the undisputed testimony shows that the Company was concerned that the Union could give notice and strike on September 14, 2010. (Wallden, 328-329). As Mr. Wallden explained, the Company could not afford to shut down the Niagara Plant during a strike, as it would be unlikely to be reopened. (Wallden, 318). And the Company knew that it needed a minimum of 60 days to prepare for a strike. As a result, the Company had a continuing interest in pushing a possible strike date out as far as possible. Accordingly, in late June and July 2010 (as the September 14, 2010 strike date approached), the Company made a proposal to extend the strike date from September 14, 2010 to March 2011, to get the issue off the table so the parties could concentrate on reaching a new contract. (Idzik, 197). The negotiation and execution of the July 2010 Interim Agreement had nothing to do with the continued extension of the 1983 CBA, and there is no evidence to the contrary.

4. Mr. Briggs Did Not Tell Mr. Idzik That the 1983 CBA Had Expired During Their Phone Call in July 2010

ALJ Wedekind erred in finding that Union representative Briggs effectively expressed the Union's belief that the contract had expired in April 2010 during his telephone conversations with Mr. Idzik on July 21, 2010. (ALJD 15:37-38). The record shows, and the Judge found, that Mr. Briggs never actually stated that he believed the 1983 CBA or the 2009 Contract Extension MOA had expired or terminated. Instead, the Judge appears to base his conclusion on Mr. Briggs telling Mr. Idzik that the "contract was 'open'; that the Company would be announcing BeneFlex changes in October; and this could be used as 'leverage' to complete negotiations." (ALJD 8:39-43). More specifically, the Judge assumed that the Union would only have "leverage" if the contract waiver provision permitting annual unilateral changes to the BeneFlex plan had expired. The Judge's assumption is erroneous and fails to take into account the Union's prior conduct.

The undisputed evidence shows that the Union claimed in October 2009 that the 1983 "contract was open" based solely on Union giving notice to terminate the contract in the future. As the parties' bargaining notes show, and as Mr. Idzik testified, both parties used the term "open contract" during the negotiations to mean that the contract had been opened for bargaining, not that it had already expired.

Moreover, it is entirely inaccurate to say that that in July 2010, the Union would have thought it only had "leverage" to challenge upcoming unilateral changes to BeneFlex if the 1983 CBA had expired. As noted above, prior to August 2010, the Union did not agree that the underlying CBA precluded it from challenging the Company's ability to make unilateral changes to BeneFlex. Indeed, the undisputed evidence shows that the Union had filed an unfair labor

practice charge in 2006, challenging the Company's right to make BeneFlex changes unilaterally while the 1983 CBA was still in place. Thus, Mr. Briggs telling Mr. Idzik that the Union believed it might have future "leverage" in negotiations based on anticipated BeneFlex changes was not indicative of any Union belief as to the alleged expiration of the 2009 Contract Extension MOA. And under those circumstances, it certainly cannot be said that Mr. Brigs provided Mr. Idzik with notice that the Union believed that the contract had expired.

Finally, the Judge's conclusion effectively ignores Mr. Idzik's testimony, which is corroborated by his contemporaneous notes. As explained above, Mr. Idzik testified that Mr. Briggs never mentioned anything about the 1983 CBA having terminated or the contract extension having expired during his telephone conversations with Mr. Briggs on July 21, 2010, or at any time prior to the Union filing its unfair labor practice charge. (Idzik, 208-209, 217). (*Id.*).[11]

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[11] The Union suggested that Mr. Briggs told Mr. Idzik during their July 21, 2010 conversation that the 1983 CBA had expired and the Union was not interested in an extension, and that Union wanted to include language in the July 2010 Interim Agreement consistent with that position. That position is not credible and reflects the Union's revisionist history. If the Union truly had wanted to ensure termination of the 2009 Contract Extension MOA, it could have, and presumably would have, simply given the Company a written termination notice to remove any conceivable doubt about the matter. As Mr. Idzik correctly noted, there is no appreciable burden associated with the Union simply giving the Company a writing terminating the 2009 Contract Extension MOA or otherwise saying it expired. (Idzik, 243-244). In fact, it is incredible to believe that the Union – which now argues that it fully intended for the contract to expire on April 30, 2010 – chose to rely on Mr. Brigg's (now discredited) memory of his July 21, 2010 telephone conversation with Mr. Idzik or the general language in the July 2010 Interim Agreement to reflect the parties' alleged understanding the 2009 Contract Extension MOA had terminated, when it could have simply issued a contract termination notice or demanded specific language in the July 2010 Interim Agreement to address the issue.

5. Mr. Williams' September 2010 Response to the Union's Objection to the 2011 BeneFlex Changes Does Not Support the Conclusion That the 2009 Contract Extension Agreement Expired in 2010

The Judge also concluded that the Company's "limited response" to Brigg's statements on September 13 and 27, challenging the Company's right to make the 2011 BeneFlex changes, indicates that the Company did not believe the 2009 Contract Extension MOA was still in effect. That conclusion is not supported by the record.

During two meetings in September 2010, the Union objected to the Company's announcement of the 2011 BeneFlex changes, just as it had the prior year while the 1983 CBA was clearly in effect. The evidence shows that the Union did not claim in either meeting that the parties' contract had expired. Instead, it simply said the Company was acting unlawfully, and referenced the 2010 *DuPont* decisions. In response, Mr. Williams said the Company disagreed with the Board's decisions, and that it simply following the *status quo* and doing what it had always done in the past with respect to announcing changes to BeneFlex to the Union. (Williams 344-345; *see also* Briggs 56-58). ALJ Wedekind found that the "most obvious and natural response, if the Company believed the contract and its waiver provision had not expired, was to the cite to the 1983 CBA or the 2009 Contract Extension MOA, instead of stating it disagreed with the decisions and following the *status quo*." (ALJD 16:5-9). The Judge fails to appreciate that Mr. Williams had no involvement in the negotiation of the 2009 Contract Extension MOA; he did not even arrive at the Niagara Plant until June 2010.

More importantly, the undisputed record shows that Mr. Williams had not read the *DuPont* decisions in September 2010; thus, he would not have been in a position to know that their outcome turned on the continued existence of a contract. Accordingly, Mr. Williams' response to the Union's objection does not indicate that the Company believed the 2009 Contract

Extension MOA had expired, particularly against the backdrop of the testimony of Mr. Idzik and Ms. Sarazin, who were involved in the negotiation of the 2009 Contract Extension MOA; and who both testified unequivocally that they did not believe the 2009 Contract Extension MOA had expired.

II. THE COMPLAINT SHOULD BE DISMISSED EVEN ASSUMING THE 2009 CONTRACT EXTENSION MOA EXPIRED ON APRIL 30, 2010, BECAUSE THE 2011 BENEFLEX CHANGES WERE PERMITTED BY THE RESERVATION OF RIGHTS CLAUSE AND AS A CONTINUATION OF THE *STATUS QUO* (Exception Nos. 33-34, 37-39)

The Complaint should be dismissed, even assuming that the 2009 Contract Extension MOA expired on April 30, 2010, for two reasons. First, the parties agreed long ago that the Union would participate in BeneFlex, subject to all the provisions of the plan document, including the reservation of rights provision; that stand-alone agreement, with its *quid pro quo*, remains in place. Second, the Company's exercise of its right to modify BeneFlex is consistent with its long-standing past practice, and as such, is not a unilateral change that can give rise to a violation of Section 8(a)(5) or (1) of the Act.

A. The BeneFlex "Reservation of Rights" Provision Exists Independently of the Collective Bargaining Agreement and Remains in Effect

The parties' agreement – that bargaining unit members would participate in the BeneFlex Plans subject to all of its terms – reflects a distinct contract, independent of the expired collective bargaining agreement. *See E.I. DuPont de Nemours, Louisville Works*, 355 NLRB No. 176 at p. 6 (Member Schaumber noting, in dissent in a case involving another DuPont site, that "the reservation of rights clause in the BeneFlex Plan is itself part of the benefits plan to which the

parties agreed contractually").[12] When the Union agreed that its members would participate in and enjoy the benefits of the BeneFlex Plans, including the BeneFlex Medical Plan, it also agreed to be bound by the terms and conditions found in the BeneFlex Medical Plan documents, including the reservation of rights provisions, as the *quid pro quo* for its members' participation in BeneFlex. *Id.*

There is no evidence that either the Company or the Union ever contemplated allowing Union members to participate in BeneFlex, while permitting Union members to elect to be governed by only those parts of BeneFlex the Union found to its liking, repudiating any provisions it found distasteful. That was never part of the parties' agreement. At the time the parties entered into the agreement to have Union members participate in BeneFlex, the Union agreed that its members would be bound by all of the terms set forth in the BeneFlex plan documents. As such, the parties' contract is reflected in the BeneFlex plan documents themselves.

The expiration of the IRP&P provision or "management rights" clause in the 1983 CBA has no bearing on the Company's right to make changes pursuant to the reservation of rights clause in the BeneFlex plan documents. The "reservation of rights" provisions found in the BeneFlex Medical Plan documents remain in effect, thereby authorizing the Company to make unilateral changes to the BeneFlex Medical Plan at issue here. *See, e.g., UMWA 1974 Pension v. Pittston Co.*, 984 F.2d 469, 473-74 (D.C. Cir 1993) (employer's obligation to make contributions

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[12] DuPont, of course, recognizes that the Board majority in the *Louisville Works* and companion *Edge Moor* case, addressed below, rejected this argument. The Company respectfully disagrees with the majority's opinion, and filed an appeal of the Board's companion decisions, which is pending before the United States Court of Appeals for the District of Columbia Circuit.

to separate pension trust agreement survived expiration of management rights clause in collective bargaining agreement because "evergreen" clause in pension trust agreement between employer and union required continued contributions at specified level going forward independent of collective bargaining agreement). Accordingly, the announcement and subsequent implementation of the 2011 BeneFlex at issue did not constitute a violation of Sections 8(a)(1) or 8(a)(5).

B. DuPont's Unilateral Changes are Consistent with Past Practice

The Complaint should be dismissed for a second, independent reason – the BeneFlex changes at issue constituted nothing more than a continuation of the *status quo*. An employer violates Section 8(a)(5) of the Act if it makes unilateral changes in terms and conditions of employment without first providing a union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The change of existing terms and conditions is what forms the basis for the statutory violation. *See The Daily News,* 315 NLRB 1236, 1237 (1994), *enf'd*, 73 F.2d 406 (D.C. Cir. 1996), *cert denied*, 519 U.S. 1090 (1997). Thus, if an employer's actions do not alter existing terms and conditions, i.e., the *status quo*, then there can be no violation of the Act. *House of Good Samaritan & Samaritan Keep Nursing Home,* 268 NLRB 236, 237 (1983). This is because an established past practice becomes part of the terms and conditions of employment or *status quo*. *Katz*, 369 U.S. at 746.

Both the Board and the courts have held that there is no violation of the Act where, as here, an employer simply follows an established past practice, even if the employer's actions involve some discretion. The *Katz* decision itself noted this principle. 369 U.S. at 745-46 (stating that implementation of unilateral merit wage increases was an unlawful change in terms and conditions of employment unless the granting of the increases was in line with a longstanding company practice, and therefore, maintained the *status quo*). Further, in *Post-*

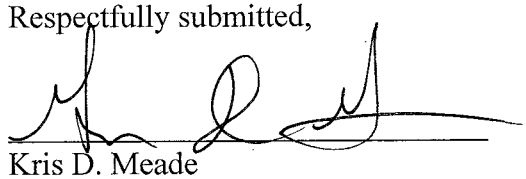
Tribune, 337 NLRB 1279 (2002), the Board held that the employer was privileged to make unilateral changes to employee health insurance benefits, even during contract negotiations, because the changes were consistent with past practice. Similarly, in *Courier-Journal*, the Board recognized, "a unilateral change made pursuant to a long-standing practice is essentially a continuation of the *status quo* – not a violation of Section 8(a)(5)." 342 NLRB 1093, 1094 (2004) (citing *NLRB v. Katz,* 369 U.S. 736, 743 (1962); *see also Shell Oil Co.,* 149 NLRB 283, 284 (1964) (employer past practice privileged a unilateral implementation of its right to subcontract, even after expiration of the parties' contract); *Post Tribune Co.,* 327 NLRB 1297 (2002) (unilateral increase in health care premiums consistent with past practice established under expired contract and did not violate 8(a)(5), even when changes made during contract negotiations).

The rationale applied in the aforementioned cases applies with equal force here. There is no dispute that the Company maintained a consistent, 14-year practice of making unilateral changes to its BeneFlex Medical Plan at the same time each year. (ALJD 10:7-8; Sarazin, 263, 291). There is likewise no dispute that the BeneFlex changes at issue here, announced in October 2010, and implemented January 1, 2011, are of a similar character as, and fully consistent with, the Company's prior history of BeneFlex changes. Accordingly, the changes at issue are "essentially a continuation of the *status quo* – not a violation of 8(a)(5)." *Courier-Journal*, 342 NLRB at 1093. For that independent reason, the Judge's decision should be reversed, and the Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Respondent E. I. DuPont de Nemours and Company respectfully requests that ALJ Wedekind's decision be reversed and the Complaint issued in this case be dismissed in its entirety.

Respectfully submitted,



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March 6, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 6th day of March 2012, I caused a true and accurate copy of the forgoing Post-Hearing Brief of Respondent E. I. DuPont de Nemours and Company to be served by electronic mail and first class United States mail, postage prepaid, on the following:

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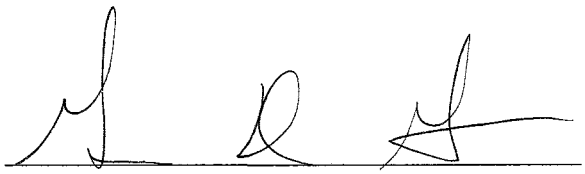

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